No. 82-1787

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, The Buckingham Corporation ("Buckingham"),[1] submits this supplemental brief to call the Court's attention to a conflict between the Court's recent decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914, slip op. (March 20,

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1 Petitioner is a wholly owned subsidiary of Beatrice Foods Company ("Beatrice"). As a result of a corporate reorganization of Beatrice and its subsidiaries, The Buckingham Corporation (the original petitioner) has been dissolved and a new corporation incorporated in the same state (Delaware). That new corporation now bears the name of The Buckingham Corporation and has succeeded to the original petitioner's interest in this action.

1984) and the decision of the Court of Appeals below in this case. In *Monsanto*, this Court enunciated the proper standard of proof required to submit a case to the jury in a distributor-termination action in which price fixing is alleged. The *Monsanto* decision makes it clear that the District Court below correctly concluded that there was insufficient evidence of a vertical price-fixing agreement to go to a jury and that the Court of Appeals erred in upsetting the District Court's directed verdict for Buckingham.

I.

The Facts and Proceedings Below

The facts and proceedings below in this case are described more fully in Buckingham's Petition for Writ of Certiorari ("Petition"), pp. 2-6. In brief, this is an antitrust case arising from the termination of Arizona Distributing Company ("ADC")—a division of Respondent at the time of trial—as one of two wholesalers of Buckingham's products in Arizona. ADC claimed in the District Court that its termination was the result of a price-fixing conspiracy between Buckingham and Copper State Distributors, Inc. ("Copper State"), Buckingham's other Arizona wholesaler.[2] At the close of ADC's case, the District Court, concluding that "there [was] no evidence to show that these parties acted in concert," directed a verdict dismissing ADC's price fixing claims. Conceding that ADC's evidence was "weak," the Court of Appeals nevertheless reversed on the ground that "there was sufficient circumstantial evidence" to go to a jury. (Petition App. B, p. 9a) The Court of Appeals emphasized two pieces of evidence discussed below.

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2 The nonprice reasons for Buckingham's termination of ADC are summarized at pages 3-4 of Buckingham's Petition.

II.

The *Monsanto* Decision

In *Monsanto*, this Court declared the proper standard of proof required in distributor termination cases to submit a case to the jury on price-fixing claims:

> "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' *Edward J. Sweeney & Sons,* [*Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (CA3 1980), cert. denied, 451 U.S. 911 (1981)]; accord *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (CA2 1981) cert. denied, 459 U.S. 880 (1982); cf. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement')."

Slip op. at 9-10. In a footnote, the Court explained:

> "The concept of 'a meeting of the minds' or 'a common scheme' in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."

Id. at 10 n.9.

The Court held that the Court of Appeals below had applied too lenient a standard of proof to determine whether there was sufficient evidence to go to a jury, but affirmed the judgment of the Court of Appeals under the announced standard as applied to the facts at issue. The Court concluded that there

was "substantial *direct* evidence of agreements to maintain prices." Slip op. at 10 (emphasis in original). This evidence included (1) extensive evidence of threats by Monsanto not to provide adequate supplies to distributors that did not adhere to its suggested retail prices; (2) a newsletter from a distributor to its dealer-customers indicating that an agreement existed among Monsanto and its distributors that minimum prices would be maintained and non-complying distributors would be terminated; and (3) an illegal joint boycott of Spray-Rite after its termination. Slip op. at 10-13 & n.13. There was also evidence that Monsanto officials "made explicit threats to terminate Spray-Rite unless it raised its prices." *Id.* at 13.[3]

III.

The Conflict Between *Monsanto* and *Buckingham*

The admittedly "weak" evidence in Buckingham (*see* Petition App. B, p. 9a) does not approach that which was found sufficient to raise a jury question in *Monsanto*. There was no evidence in *Buckingham* of threats or an agreement to maintain prices;[4] nor, as the District Court concluded, was there evidence to support a finding that Buckingham and Copper State acted in concert. The Court of Appeals identified two pieces of evidence which it considered sufficiently "persuasive" to take the case to the jury. Both pieces of evidence, however, are plainly insufficient under the standard of proof announced by this Court in *Monsanto*.

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3 Much of this evidence was not discussed in the Court of Appeals' opinion in *Monsanto*, which stressed evidence of complaints followed by termination. Hence this evidence was not addressed in Buckingham's petition last spring.

4 Even the Respondents' adversarial statement of the record (Br. in Opp. to Petition 2-5) shows that there were no threats and no suggestions of future pricing by Buckingham.

First, the Court of Appeals cited an internal Buckingham memorandum ("the Ahlburg Memorandum"),[5] which said nothing about an agreement, but which the Court suggested might evince "the pricing reasons for the termination." (Petition App. B, p. 9a) Even if the Court of Appeals' interpretation of the Ahlburg Memorandum were correct—and the overwhelming weight of the evidence at trial indicated that Buckingham's principal reasons for terminating ADC were unrelated to price[6]—it would have made no difference. As this Court stressed in *Monsanto*, a supplier has every right to terminate a wholesaler unilaterally for price reasons—even if those are its only reasons, which was not the case here. Slip op. at 6, 8 (citing *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919)). The issue is not the supplier's reasons for terminating a distributor, but whether a price-fixing agreement existed with the nonterminated distributor.

Second, the Court of Appeals also referred to testimony that the chief executive of Copper State offered to make a "commitment" in exchange for an exclusive distributorship. While acknowledging that this remark (taken entirely out of context, which plainly indicated that the remark had nothing to do with prices) "might have only meant a commitment to sell the product aggressively," the Court of Appeals concluded that "a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." (Petition App. B, p. 10a) The only reference to such a "commitment" in the entire record is two pages of testimony by Ken Ahlburg, Buckingham's Western Division Manager, in which he reports that the president of Copper State requested an exclusive distributorship (as had the president of ADC) and offered to make the following "commitment" (Trial Tr., p. 713):

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5 Annexed to Buckingham's Petition as Exhibit F.

6 See Buckingham's Petition at 3-4.

"whatever it takes to build this brand I'm here to do it. *I'll work.*"

(Emphasis added).[7]

This testimony does not in any way suggest "a conscious commitment to a common scheme designed to achieve an unlawful objective." Indeed, it shows a desire to engage in vigorous interbrand competition—precisely the kind of conduct the antitrust laws were primarily intended to foster. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law"). No reasonable jury hearing this evidence could have construed this remark as an agreement to fix prices, without resorting to guesswork or conjecture which the District Court property did not permit. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943); *see also Monsanto*, Slip. Op. at 8 ("If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunicated in *Sylvania* and *Colgate* will be seriously eroded").

As this Court emphasized in *Monsanto*, "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages." Slip Op. at 8. The Court of Appeals below erred in not drawing this crucial distinction. The evidence of independent nonprice reasons for Buckingham's decision to select Copper State as its exclusive distributor was overwhelming and, by and large,

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7 The Court of Appeals ignored the Ahlburg testimony which immediately followed (Trial Tr., pp. 713-14):

"Q: Did Mr. Gellerman [Copper State's chief executive] make any promises at that meeting concerning his pricing of Cutty Sark?
A: No.
Q: Concerning his discounting of Cutty Sark?
A: No.
Q: Did you ask him for any commitments concerning pricing?
A: No.
Q: Concerning discounting?
A: No."

uncontradicted.[8] The evidence that Buckingham was concerned about the prices ADC charged and that the president of Copper State committed to work to build its supplier's brands simply does not "tend[] to exclude the possibility that [Buckingham] and [Copper State] were acting independently." *Monsanto*, Slip Op. at 9. Thus, the evidence was insufficient to permit a jury to find an unlawful price-fixing conspiracy under Section 1 of the Sherman Act.

The Respondent's adversarial statement of the record cites no other evidence—direct or circumstantial—which would support the Ninth Circuit's decision. The fact is, as the District Court concluded, that there was no evidence of concerted unlawful action by Copper State and Buckingham. In sum, the evidence below does not even approach that required under this Court's decision in *Monsanto*. Indeed, in view of the absence of any probative evidence to support the Court of Appeal's judgment, this is an appropriate case for summary reversal.

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8 *See* Buckingham's Petition at 3-4. Indeed, ADC's President acknowledged that Buckingham's practice of selling its products through two distributors in Arizona placed it at a significant competitive disadvantage in a market where exclusive distributorships were the rule. *See* Buckingham's Petition at 3 and App. E thereto.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Reply Brief, we ask that the petition for writ of certiorari be granted and suggest that the judgment of the Court of Appeals below be reversed summarily. At the least, the Court should reverse and remand *Buckingham* for reconsideration in light of its decision in *Monsanto*.

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